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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANDREA COLOCHO, a Minor, etc., et al., Plaintiffs and Appellants, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B206426 (Los Angeles County Super. CT. No. BC363749)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

Law Officers of Carl A. McMahan, Carl A. McMahan, Robert J. Ounjian; Esner, Chang & Ellis, Stuart B. Esner and Holly N. Boyer for Plaintiffs and Appellants.

Law Office of Gary A. Bacio and Gary A. Bacio for Defendant and Respondent Los Angeles Unified School District.

The fundamental issue in this case is whether a public school district may be held liable for injuries suffered by a second grade student who was hit by a vehicle while walking home after school was dismissed. In the context of a motion for summary judgment, the trial court answered this question, "no." The ensuing appeal presents two subcomponent issues for our consideration. The first issue involves a pure question of law: Do administrators at public elementary schools have a duty not to allow students to walk home after school is dismissed except in the company of an adult? The second issue is whether there is any evidence in the record to show that the administrators at Maurice Sendak Elementary School (Sendak) in North Hollywood assumed such a duty, or, in the language of the summary judgment statute, does the record disclose any triable issues of fact which need adjudging to determine whether Sendak assumed a duty not to allow its students to walk themselves home at the end of a school day? Our answer to both questions is, "no," and, in the absence of the threshold element of duty, we affirm the summary judgment in favor of defendant Los Angeles Unified School District (District).

FACTS

Sendak's campus in North Hollywood abuts Tiara Street on the north, Tujunga Avenue on the east, and Califa Street on the south. In July 2006, Andrea Colocho was a second grade student at Sendak.

The school's written dismissal policies and procedures in effect at that time required its teachers and/or other staff to walk students in kindergarten and first grade from their classrooms to the school's exit on Tujunga Avenue, and to release a student only to an adult who was listed on the student's emergency card. The dismissal policies and procedures for students in the second through fifth grades were different. Those students were walked by teachers and/or other staff to the school's main gate on Tiara Street, where they were dismissed, and free to walk home with or without an adult, or be picked up by a parent or guardian. Sendak's dismissal policies and procedures were put into place in written form in 2005, and made part of the teachers' handbook. The

school's dismissal policies and procedures were distributed to all teachers and staff, and sent to the households of all students.

On July 21, 2006, Plaintiff Andrea Colocho (Andrea) left Sendak from the Tiara Street gate at the end of the school day, and started to walk home. Approximately two city blocks distance from the Tiara Street gate, Andrea suffered injuries in a vehicle versus pedestrian accident which occurred in the roadway of Tujunga Avenue. Based on the site of the accident, it is probable that Andrea left Sendak's Tiara Street gate, walked east a short distance to Tujunga Avenue, turned right and walked south, crossed Califa Street, and then continued to walk south to a point about 68 feet north of Emelita Street, where she entered the public roadway of Tujunga Avenue and was hit by a passing commercial vehicle.

In December 2006, Andrea sued the District.[1] In September 2007, Andrea filed a third amended complaint alleging two causes of action against the District. Andrea's first cause of action for "premises liability" alleged that the District had negligently managed its premises, willfully failed to warn against a dangerous condition on its property, and maintained a dangerous condition on public property in violation of Government Code section 830 et seq. The second cause of action alleged a claim for "general negligence."

In October 2007, the District filed a motion for summary judgment supported by a separate statement and evidence setting forth the facts outlined above. With regard to the governing law, the District argued that Andrea's cause of action for "premises liability" failed because the District did not own the public roadway where Andrea's accident had occurred, and that Andrea's cause of action for negligence failed because the District was not liable under Education Code section 44808 for any injuries suffered by a student off school property.

Andrea opposed the District's motion for summary judgment with evidence in the form of testimony excerpted from a deposition given by Sendak's principal, Nancy Oda. Principal Oda's testimony showed she recognized that vehicle traffic on Tujunga Avenue

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1 The other defendants in Andrea's action are not relevant to her current appeal.

posed a danger to students who attended Sendak. Principal Oda's testimony also showed that Sendak has a practice of having "observers" at the Tiara Street gate when its second through fifth grade students are dismissed, and that an observer will, "to some degree," return a student to the school office when the observer does not "make visual contact" with an adult who comes to pick up a student. As explained by Principal Oda, the school's practice of having observers at the Tiara Street gate is "informal. If the child recognizes the adult. There is no connection to the emergency card. If the child looks uncomfortable, that is what they're looking for — that this is the wrong person to take the child. [¶] . . . [¶] It's more of a general observation." In the case of a second through fifth grade student who waited to be picked up by a parent, but the parent did not show up at the school, that student would be taken to the school office.

In addition to Principal Oda's deposition testimony, Andrea submitted excerpts from a deposition given by kindergarten teacher Ann Marie Nagel which showed that, shortly after Andrea's accident, there was a school staff meeting at which Principal Oda talked about the accident, and said, "[W]e need to be more safe," and also stated "something like" the teachers needed to "make sure they [saw] the kids put in the custody of [a] parent or guardian," including the second through fifth grade students. Excerpts from deposition testimony given by Blanca Lila Mendez, a "discipline monitor" supervised by the assistant principal, showed that the assistant principal called a meeting shortly after Andrea's accident, and made a series of statements to the effect, "[W]e just have to pray for her recovery," and, "[Y]ou should really make sure that [students] get in the hands of an adult before they leave." Mendez also testified, "[W]e have been told . . . that the kids cannot leave the yard -- [¶] . . . [¶] . . . until the parents come and -- [¶] . . . [¶] . . . take them."

Apart from the evidence supplied by the Sendak personnel, Andrea also submitted a declaration from her mother, Roxanna Aguirre, who stated: "[I]t was my understanding that the policy and procedure at the school was to release my child, Andrea, to me or [a] guardian at the Tiara Street exit gate at the time of dismissal. It was also my understanding that the school would supervise and hold Andrea at the Tiara Street exit

gate until she was picked up by me or her guardian. [¶] . . . I relied upon [Sendak] to supervise and hold Andrea at the Tiara Street exit gate until she was picked up by me or her guardian at the time of dismissal. [¶] . . . I never authorized [Sendak] to allow Andrea to leave school alone, at the time of dismissal, without either me or [a] guardian."

Finally, Andrea also submitted a declaration from Craig Cunningham, "an expert in school safety." Cunningham's declaration stated that he had reviewed discovery and other materials associated with Andrea's case, and that, based on his review, "[i]f called to testify . . . , [he] would competently testify to the following *facts*." (Italics added.) Cunningham then set forth his findings of fact, including the following: "Principal Oda created and implemented a policy and procedure for the safe dismissal of [Sendak's] students[] [¶] . . . as follows: [¶] A. Two . . . school personnel were officially required to be at the dismissal gate, located on Tiara Street, to monitor and supervise the safe dismissal of second through fifth grade students . . . ; [¶] B. Two . . . school personnel were required to make visual confirmation to ensure or guarantee that the student was in the care and custody of his or her parent or guardian before they were released from [Sendak]."

In addition to his factual findings regarding the dismissal policies and procedures which had been put in place at Sendak, Cunningham offered his "opinion" that "requiring visual confirmation of student with parent/guardian at dismissal [at the Tiara Street exit gate]" was "reasonable and necessary" for the safety of Sendak's students. Cunningham then resumed his fact finding, stating that Sendak had "*failed to implement and supervise* its Tiara Street dismissal policy as stated, thereby allowing Andrea . . . to leave the school *without* a parent or guardian, which directly led to and caused her to suffer her injuries; a known consequence of Tujunga Avenue."

Prior to the hearing on its motion for summary judgment, the District filed a series of objections to all and specific parts of the expert declaration submitted by Andrea on the ground that the expert's opinions contained legal conclusions and lacked evidentiary foundation.

After lengthy arguments at a hearing on January 10, 2008, the trial court sustained the District's objections to the expert's declaration submitted by Andrea, and granted the District's summary judgment motion in a well-reasoned, 11-page order. In granting the motion, the court ruled that "[s]chools have a duty to take reasonable steps to supervise the release of students from school grounds at the end of the school day," but concluded that there was "no dispute that the dismissal procedures at [Andrea]'s school were reasonable."

On January 30, 2008, the trial court entered summary judgment in favor of the District.

Andrea filed a timely notice of appeal.

DISCUSSION

I. The Governing Statutes

Under the California Tort Claims Act (Gov. Code, § 810 et seq.), public entities are not liable for any injuries caused by the acts or omissions of their employees, except as provided by statute. (Gov. Code, § 815, subd. (a).) Government Code section 815.2, subdivision (a), is such a statute. It provides that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee." Stated in other words, Government Code section 815.2, subdivision (b), "makes the doctrine of respondeat superior applicable to public employers," meaning a public entity is "vicariously liable" for any injury which one of its employees causes, to the same extent as a private employer. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.) Under this statutory scheme, a school district is vicariously liable for a student's injuries proximately caused by the negligence of its schools' personnel. (*Ibid.*)

Education Code section 44808 provides: "Notwithstanding any other provision of [the Education Code], no school district . . . or employee of such district . . . shall be responsible or in any way liable for the conduct or safety of any pupil of the public

schools at any time when such pupil is not on school property, unless such district . . . or person has . . . specifically assumed such responsibility or liability . . . ."[2]

The case on appeal before us today meets at the intersection of Government Code section 815.2, subdivision (b), and Education Code section 44808. Plaintiff's theory is that a negligent dismissal practice applied *on* school property gives rise to liability for a student's injuries proximately caused *off* school property. Plaintiff's theory, of course, begs the question of whether there was a "negligent" dismissal practice at Sendak in the first instance, which brings us to the first of our questions set forth at the outset of this opinion.

II. Our State's Elementary Schools Do Not Have a Duty Not to Allow Students to Walk Home at the End of the School Day Without a Parent

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court." (*Bily v. Arthur Young & Co*. (1992) 3 Cal.4th 370, 397.) Under well-settled case law, the imposition of duty is largely a matter of public policy and involves a balancing of various factors, including the foreseeability of harm to the plaintiff, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, the consequences of imposing a duty with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113; see also

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[2] Education Code section 44808 states: "or has failed to exercise reasonable care under the circumstances." This language does not establish an independent basis for liability, but rather applies to the preceding parts of the section, i.e., an off-campus event for which a school has expressly assumed responsibility or liability for the conduct or safety of its students. (See, e.g., *Wolfe v. Dublin Unified School Dist.* (1997) 56 Cal.App.4th 126, 129.)

Brownell v. Los Angeles Unified School Dist. (1992) 4 Cal.App.4th 787, 795-796 ["The standard of due care imposed on school authorities in exercising their supervisorial responsibilities [over students] is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances"].)

As a matter of policy, we decline to declare by judicial fiat that our state's public elementary school administrators cannot allow students to walk home alone from school at the end of the school day without opening themselves to negligence claims. First, the potential liability exposure and resultant costs from imposing such a duty are undoubtedly extreme. Second, although there was a relatively short temporal connection between allowing Andrea to walk home and her accident, Sendak had no involvement in the accident itself — a motorist with no relationship to the school, driving a vehicle on a public roadway off school property, hit Andrea. No moral blame affixes on a school for allowing students to walk home after the school day has ended. Finally, imposing a duty on schools not to allow students to walk home at the end of the school day would have adverse social consequences in the form of constrained schoolchildren, burdened parents and families, and the failure to teach life skills and responsibility in young people.

The fact that Sendak is located adjacent to a heavily traveled roadway does not convince us to affix a more directly targeted duty on Sendak in this case. We accept as an undeniable fact that many public schools in our state's urban areas are located on or near heavily trafficked public roadways. We also accept as fact that any number of other types of foreseeable dangers may exist near both urban and rural schools. Foreseeable dangers in our communities in our modern times, however, are not a sufficient reason to affix a duty on our public schools to prevent students from walking home on their own at the end of the school day. In the event that unique, special circumstances are presented in another case, the duty question may be different, but a generalized concern about traffic (or other social ills) is not enough to impose the duty argued to exist by Andrea in the case before us today.

Andrea's reliance cases such as *Hoyem v. Manhattan Beach City Sch. Dist*. (1978) 22 Cal.3d 508, and *Constantinescu v. Conejo Valley Unified School Dist*. (1993) 16 Cal.App.4th 1466, do not persuade us to reach a different "duty" conclusion. *Hoyem* and its kith and kin involved situations where school authorities failed to exercise due care over students *during* the school day; *Constantinescu*, although involving injuries suffered after school, involved a situation where a school maintained its own property in a dangerous condition, resulting in student being hit by a vehicle on school property. In our view, for the reasons explained above, the duty analysis is different where the issue is whether a school may, without being exposed to liability, allow its students to walk home alone from school *after* the school day is over.

We also reject Andrea's reliance on cases such as *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, and *Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, for the proposition that her expert's opinions should be considered in the duty analysis. Those cases address the utility of expert testimony at *trial* to meet the burden of proving the question of fact presented in a case where a plaintiff claims a professional violated his or her duty of care. We agree that a trier of fact may need expert opinion to determine, for example, whether a doctor did something wrong during surgery, but such expert-dependent cases are not helpful to us in addressing the duty issue presented in Andrea's case. Whether or not to allow schoolchildren to walk home alone at the end of the school day is a policy choice, dependent on a common sense balancing of risks and benefits, not an expert's opinion. This, then, brings us to our second question.

III. There is No Evidence in the Record Showing that Sendak Assumed a Duty Not to Allow its Students to Walk Home Alone at the End of the School Day

Andrea contends the trial court erroneously sustained the District's objections to her expert's declaration, and that, had the expert's declaration been properly considered, the court would have (and should have) found that triable issues of fact existed regarding whether or not Sendak assumed a duty to prevent its students from walking home alone at the end of the school day. We disagree.

The trial court properly excluded the declaration from Andrea's expert because it contained little more than legal conclusions. Indeed, a fair reading of the "opinions" set forth in the expert's declaration leads us to conclude that he believed it was his role to tell the trial court what the "true" facts actually were — i.e., that Sendak had, in fact, put into place dismissal policies and procedures which required school staff to release a student into the custody of an adult. In other words, the expert usurped the trial court's role to evaluate the record and determine whether there was any disputed evidence requiring a trial to determine facts. The expert's declaration was irrelevant and without foundation because he had no involvement in any event in any way related to what had or had not occurred on the Sendak campus vis-à-vis the implementation of any dismissal policies or procedures.

Taking another tack, Andrea next contends that, even without consideration of her expert's declaration, there remained triable facts associated with the issue of whether or not Sendak assumed a duty not to allow an unaccompanied second grade student to leave campus at the end of the school day. We disagree. Andrea's argument relies on snippets of testimony from Principal Oda's deposition which, according to Andrea's opening brief, show that Sendak had a policy "requiring visual confirmation that second graders . . . were being escorted off campus by an adult." Andrea reads too much into the isolated passages of the deposition testimony of Principal Oda. Even when construed in the light most favorable to Andrea (see, e.g., *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768), the evidence in the record shows, at best, that Sendak placed staff members at the Tiara Street gate to observe dismissal, to assure that a student did not look "uncomfortable" leaving with a particular adult, or to walk a student back to the school office when his or her parent failed to make an arranged pickup. We see no evidence in the record which would support a factual finding that Sendak had taken on a duty not to allow students to walk home after school except in the company of an adult.

The declaration submitted by Andrea's mother does not change our perspective. Andrea's mother declared it was her "understanding" that Sendak's dismissal policy was to release Andrea to her mother or a guardian at the Tiara Street gate, and otherwise to "hold" Andrea at the gate until she was picked up by her mother or a guardian. The deficiency with Ms. Aguirre's declaration, however, is that it does not explain how or why she came to her "understanding" of Sendak's dismissal policy. A unilateral belief that a defendant has assumed a duty does not make it so.

Finally, the evidence from teacher Nagel and discipline supervisor Mendez does not support a factual finding that Sendak assumed a duty not to allow its students to walk themselves home after school. Teacher Nagel's deposition showed that, *after* Andrea had been injured, Principal Oda emphasized to school staff the need to be careful. We would expect nothing less from a competent and caring school principal, but such comments do not show that Sendak had assumed a duty not to allow its students to walk home after school. Our assessment of the evidence provided by disciplinarian Mendez is the same.

IV. There is No Evidence that Sendak Assumed a Duty to Supervise Students as They Walked Home From School After the End of the School Day

We address one final issue, although not directly raised in Andrea's opening brief on appeal. Since no duty existed *on* Sendak's property not to allow its students to walk home alone after school, the only remaining avenue to liability is whether, in accord with Education Code section 44808, Andrea presented evidence tending to show that Sendak "specifically assumed . . . responsibility" for Andrea's safe conduct home after she had already walked approximately two blocks away from school property. An exegetic discussion is not required. There is no such evidence in this case, which explains why Andrea attempts to affix a "dismissal" duty arising *on* school property. As the District correctly notes in its respondent's brief, our state's courts have time and again ruled that schools do not have a duty to provide traffic protection to students while they are en route to or from school. (See, e.g., *Searcy v. Hemet Unified School Dist*. (1986) 177 Cal.App.3d 792, 804-805; *Guerrero v. South Bay Union School Dist*. (2003) 114 Cal.App.4th 264, 269-272.)

DISPOSITION

The summary judgment is affirmed. Respondent is to recover its costs on appeal.

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BIGELOW, J.

I concur:

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Rubin, Acting P. J., Concurring:

I concur in the majority's opinion affirming summary judgment for the school district. I do not agree, however, with the majority's analysis of the district's duty of care toward appellant, and thus I write separately.

Generally, a school district is not liable to a student for injuries occurring away from school property. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1357; Ed. Code, § 44808.) Education Code section 44808 permits some narrow exceptions to a school district's general exemption from liability. One of those exceptions applies when a student's injury off school grounds arises from the school's breach of a duty it voluntarily assumed. Section 44808 states: "[N]o school district . . . shall be responsible or in any way liable for the . . . safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district . . . has otherwise specifically assumed such responsibility or liability . . . ." (*Id.*, § 44808.)

Appellant's complaint alleged the district voluntarily assumed a duty to ensure each second grader was released at the end of the school day to that student's parent or guardian at the school yard gate. According to appellant, the district breached its duty by letting appellant walk home unaccompanied, which led to her tragic injury when she darted from behind a parked vehicle into traffic and was hit by a truck. The district's motion for summary judgment argued the district had not assumed a duty to ensure second graders were released to responsible adults. (The evidence showed the district had assumed such a duty only for kindergarteners and first graders.) Because appellant's complaint had framed appellant's claim as being the district's assumption of a special duty, the district's motion for summary judgment did not need to address the possible existence of a general duty to ensure the safe release of students at the end of the school day. (*Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 764 [pleadings frame the issues for summary judgment]; *B.L.M. v. Sabo & Deitsch*

(1997) 55 Cal.App.4th 823, 834.) Appellant's opposition to summary judgment said nothing about the district's failure to negate a general legal duty of safe release; indeed, the opposition expressly disavowed the existence of a general duty, stating that appellant "understands [the trial court's] concern over not wanting to create a sweeping duty of care for school districts where one did not exist before . . . . The court does not need to do that here [to deny summary judgment]. The defendant district created the *special duty* vis a vis its own dismissal policies and procedures." (Italics in original.) For the reasons the majority discusses in its opinion [maj. opn. pp.10-11], the trial court correctly found no triable issue that the district had assumed a special duty. Accordingly, the court correctly entered summary judgment for the district.

I write separately to emphasize that the district is not, however, the final arbiter of its duties involving the safe release of students from school. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503 [existence of duty a legal question for court to decide].) A school's duty for the safety of its students is most discernible during school hours on school property. (*M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517 [general duty to protect students from harm].) But that duty does not necessarily end when the dismissal bell rings and the children walk out the school yard gate. Thus, to the extent the majority holds a school has no duty to ensure students leave school at the end of the day in safety, I decline to join in the holding.

A school that permits a student to leave school in an unsafe or unauthorized way may subject the school to liability. For example, *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, held a school district could be liable for negligent supervision of a ten-year-old truant student who was hit by a motorcycle when he left school during school hours without authorization. (*Id.* at pp. 511-512.) *Brownell v. Los Angeles Unified School Dist.* (1992) 4 Cal.App.4th 787 allowed for the possibility of liability if the school released students from school grounds despite knowing of a real and imminent threat of gang violence outside the school yard. (*Id.* at p. 797.) And *Perna v. Conejo Valley Unified School Dist.* (1983) 143 Cal.App.3d 292 allowed 12- and 14-year-old sisters to state a claim against their school district for injuries they suffered after the 12-

year-old's seventh grade teacher asked the younger girl to stay after school to help grade papers. Walking home shortly after 3 p.m., the girls were hit by a car in an intersection normally manned by a school crossing guard until 2:45 p.m. The sisters alleged the district was liable for their injuries because the seventh grade teacher knew, or should have known, the crossing guard would not be at the intersection when the girls walked home. The *Perna* court permitted the sisters to pursue their claim. (*Id.* at p. 294.) Just as it can be said that students do not abandon their constitutional rights when they enter the school house door at the beginning of the day (*Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 506), a school's responsibility to ensure the safety of students does not entirely evaporate as students walk out those doors when the school day ends. Indeed, the school's own policies in this case reveal what one might construe as silent acknowledgement that the district owes some measure of duty toward students' safe departure from school because the school did not let kindergartners and first graders walk home unaccompanied, but released them only to responsible adults.

My departure from the majority's conclusion that the district owed no duty to appellant is informed by the uncontroversial observation that a school would almost certainly be acting reasonably in letting junior high and high school students walk home unaccompanied. On the other hand, a school operating a preschool program for young toddlers would be acting unreasonably in letting preschoolers find their way home on their own. A duty of safe departure obviously thus exists; somewhere along the continuum between toddler and adolescent a seven year old second grader such as appellant stands. Under the authorities cited previously whether a school district acted reasonably in permitting a second grader to leave school unattended would normally be a question for the trier of fact, not a question of legal duty. Appellant did not, however, argue a general duty of care below – indeed, she disavowed it. She now raises for the first time on appeal her contention that the district owed a general duty of care in seeing she left school in safe circumstances. Her new contention comes too late. (*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 54 [cannot create triable issue for summary judgment by

raising new theory on appeal].) I therefore concur in the majority's opinion affirming summary judgment for the district.

RUBIN, Acting P. J.